Department of Justice

STATEMENT

OF

BENJAMIN R. CIVILETTI
ATTORNEY GENERAL

BEFORE

THE

SUBCOMMITTEE ON RULES OF THE HOUSE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

LEGISLATIVE VETO

ON

SEPTEMBER 26, 1979

Mr. Chairman and Members of the Subcommittee:

I have been asked to appear this morning to discuss with you the legislative veto. While I recognize that an argument advanced in favor of legislative veto provisions is that they will assist Congress in its important goal of improving oversight of the federal bureaucracy, it is my opinion that these provisions violate the letter and spirit of our Constitution. I further believe that legislative veto devices actually exacerbate, rather than ameliorate, problems which need urgent attention, such as agency delay, lack of accountability and the power of special interest groups in the regulatory process.

In a message transmitted to both the House and the Senate on June 21, 1978, the President stated his position that legislative veto provisions are unconstitutional because they infringe upon the Executive's constitutional duty to faithfully execute the laws and because they authorize congressional action that has the effect of legislation but deny the President the opportunity to exercise his veto. Legislative vetoes thereby circumvent the President's role in the legislative process established by Art. I, § 7 of the Constitution. I am submitting a copy of the President's message and I ask that it be included in the record.

Today I would like to address the Constitutional issue because of the importance I attach to preserving the system of government established almost 200 years ago--one which has served us well. I believe that legislative veto devices threaten fundamental principles which have given our government resiliency and longevity.

Section 4 of H.R. 1776 would require, inter alia, that no agency rule (other than an emergency rule) shall become effective if within 90 calendar days of continuous session of Congress both Houses of Congress adopt a concurrent resolution disapproving the rule, or if within 60 calendar days of continuous session of Congress one House of Congress adopts such a resolution and transmits it to the other House which does not disapprove it within 30 calendar days of continuous session after its transmittal. In addition, either House of Congress may adopt a resolution directing agency reconsideration of a rule other than an emergency rule within 90 calendar days of continuous session of Congress after the rule was promulgated. H.R. 601 provides, inter alia, that an agency rule shall not become effective if within 60 legislative days after promulgation either House of Congress adopts a resolution disapproving it because it is contrary to law, congressional intent or beyond the legislative mandate.

H.R. 512 provides, in its bare essentials, that an agency rule shall not become effective if within 60 calendar days after its promulgation, either House of Congress adopts a resolution disapproving such rule or regulation.

Although the particular procedural mechanisms provided for in these three bills differ in certain respects, the fundamental constitutional issue posed by each of them is the same. My analysis of the constitutionality of the legislative veto is quite simple. The objective of a legislative veto, as I understand it, is to increase political accountability on the part of the so-called "unelected bureaucrats." Yet legislative vetoes actually have the perverse effect of removing the President, the one person among us who is elected by all the people of this country, from participation in the process by which this political accountability is to be achieved. Indeed, some legislative vetoes permit either the House or Senate acting alone to nullify executive action thus removing one House of Congress as well as the President from participation in the process, permitting one House of Congress to block action which an agency has taken, with which the other House and the President may be in agreement and which might well be upheld by a court on review for its legality.

From the outset it is apparent that a system specifically designed to concentrate "political accountability" in one House of Congress or in both Houses without the participation of the President raises constitutional questions of the first order. The starting point of any analysis of American constitutional government, a government of limited powers, is that the Framers constructed a very carefully balanced system of accountability based on a tripartite separation of powers. The legislative power was vested in the Congress, the power to execute the laws passed by Congress was vested in the Executive, and the power finally to say what the law is was left to the courts. But the power of Congress to legislate is not unrestrained; it was made subject to the President's veto. Nor is the President's power to execute the law absolute; Congress could always override the President's action by enacting new legislation. And if the legislation were vetoed by the President, then Congress has the ultimate authority to override the veto. That is our constitutional system, a system based on a carefully designed balance of powers.

The proponents of legislative vetoes would upset this balance. Legislative vetoes authorize congressional action which has the effect of legislation, but deny to the President his constitutional role in the process, the power to approve or dissapprove that congressional action under Art. I, § 7 of the Constitution.

A. The Presentation Clauses

The legislative veto simply cannot stand in the face of the language and history of the Presentation Clauses, clauses 2 and 3 of Art. I, § 7. Clause 2 provides, first, that every bill which passes the House and the Senate shall, before it becomes law, be presented to the President for his approval or disapproval. If disapproved, it does not become law unless repassed by a two-thirds vote of each House. (Art. I, section 7, clause 2). At the Constitutional Convention the Framers considered and explicitly provided for the possibility that Congress might attempt to evade the requirement that "bills" be presented to the President by passing "resolutions" rather than bills. During the debate on this clause, James Madison observed that

> If the negative of the President was confined to bills, it would be evaded by acts under the form and name of Resolutions, votes & c . . .

Madison believed that additional language was necessary to pin this point down and therefore

> proposed that "or resolve" should be added after "bills" . . . with an exception as to votes of adjournment & c.

Madison's notes show that "after a short and rather confused conversation on the subject," his proposal was at first rejected. However, at the commencement of the

following days's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it. It passed by a vote of 9-1. 2M Farrand, Records of the Federal Convention of 1787 (rev. ed.) 301-35. Thus, the Constitution today provides--not in clause 2 of section 7, dealing with the passage of legislation (which has its own Presidential veto provision), but as an entirely separate clause, Art. I, § 7, cl. 3--that:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The wording of this provision is plain and its formulation as a separate clause apart from the clause dealing with legislation is clear in its intent to protect against all congressional attempts to evade the President's veto power. The function of the Congress in our system is to legislate, and all final congressional action of public effect, whether or not it is formally called a law, must follow the prescribed procedure which includes presentation to the President for his approval or veto.

B. Separation of Powers

The principle of separation of powers--which James Madison described as the most fundamental principle in our Constitution--provides that each of the three branches of our government must restrict itself to its allocated sphere of activity: legislating, executing the law, or seeing to its interpretation. This is not to say that every governmental function is inherently and of its very nature either legislative, executive, or judicial. Indeed, some activity might be performed by any of the three branches--and in that situation it is up to Congress to allocate the responsibility. See, e.g., Wayman v. Southard, 10 Wheat 1, 42-43, 46 (1825). Once it has done so, however, the very essence of separation of powers requires that Congress cannot control the discharge of functions assigned to the Executive branch or to the courts, except through the plenary legislative process of amendment and repeal.

Beginning with a statement by James Madison during the Great Debate of 1789 concerning the statutes establishing offices, it has been recognized that the power of Congress over the execution and implementation of a statute comes to an end with its enactment. See Annals of Congress, 1st Cong., col. 582. The President, not Congress, has the sole authority and responsibility to

ensure that the laws are faithfully executed pursuant to Art. II, § 3 of the Constitution. The President can be overruled in his interpretation of the law by the courts in a particular decision, and by the Congress through legislation. But the essential fact is that Congress can only overrule the President by passing new legislation and, if necessary, doing so over the President's veto.

Proponents of the legislative veto argue that such devices actually fortify the separation of powers by providing Congress with a check on an agency's exercise of delegated power. No doubt congressional review is a check on agency action, just as committee review or committee chairman review would provide a check. But such review involves the imposition on the Executive of a particular interpretation of an enacted law--the interpretation of a new Congress, or one House of that Congress, or one committee, or one chairman--without the check of the legislative process which includes the President's veto. In that case Congress is either usurping the power of the President to execute the law, or of the courts to construe it; or Congress is legislating. If it is legislating, which is the only power given to Congress to exercise, the Constitution is explicit that the President

must have the opportunity to participate in that process by vetoing the legislation. Unfortunately, the legislative veto will only compound, and not reduce, the frustrations experienced by dedicated public servants and interested citizens. As the President stated in his message of June 21,

> The most troubling problem . . . is that the legislative veto treats symptoms not causes. The vast effort required to second-guess individual regulatory decisions could impede the crucial task of revising the underlying statutes.
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> Agencies issue regulations because Congress passes laws authorizing them, or frequently mandating them. Many of these laws have not been seriously re-examined for years and need change . . . . We must deregulate where appropriate, make regulation easier to understand and to honor, and control the costs which regulations impose on our economy.

The Justice Department and the Administration are ready to work closely with the Congress in accomplishing the laudable goals of regulatory reform. But the device of the legislative veto is an unacceptable and inappropriate means of attempting to achieve them. It exacerbates existing problems in several respects and does fundamental violence to principles underlying our Constitution which federal officials, appointed and elected, have sworn to uphold.

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